IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3123 OF 2004

Twenty First Century Wire Rods Limited .. Petitioners

Vs.

The Administrator, Dadra Nagar Haveli, Silvassa (UT) & Ors. .. Respondents

Mr.V.A.Thorat, Senior Counsel with Mr.Piyush Shah with Ms.Nita Parikh for the petitioners

Mr.R.S.Desai for the respondents

CORAM: S.U.KAMDAR, J
DATE : 25TH NOVEMBER, 2005

ORAL JUDGMENT:

1. By the present petition, the petitioners are challenging the demand notice dt.22.09.03 issued by the respondent no.3 and the impugned order dt.2.3.04 passed by the respondent no.1 in Appeal by which the demand issued by Respondent no.3 has been confirmed. Some of the material facts pertaining to the present petition are briefly enumerated as under:

2. On 27.12.01, respondents gave a sanction in

principle of HT load of 4000 KVA to the petitioners company situated at Village Parzai and Khadoli viz., Unit No.1 and 2 at Silvassa. On 11.11.02 an agreement was executed by and between the petitioners and the respondents for the aforesaid supply of electricity on the various terms and conditions which are specified therein. On 13.11.02, the power connection was activated and the power was released in favour of the petitioners. On 19.12.02, the respondents raised a demand for the sum of Rs.56,03,815.50 in so far as Unit No.1 of the Petitioners at Village Parzai was situated. On 19.6.03 the petitioners challenged the said demand made by the respondents by filing an appeal being appeal no.1 of 2003. The said appeal was ultimately dismissed by order dt.19.6.03. In June 2003 the petitioners preferred the Writ Petition being Writ Petition No.4259 of 2003 in this court challenging the said order of 19.6.03. During the pendency of the said petition, on 17.7.03 the meters of the petitioners were checked by the respondents and they were supposed to have been found in order.

3. On 1.9.03 there was a raid by Flying Squad of the respondents who visited the factory premises at Unit No.2 Village Khadoli and found the meters and the seal thereof tampered with. They also found that there is a theft of energy by the petitioners. The said authorities thereafter made a panchnama. The respondents thereafter raised a demand on 2.9.03 for the sum of Rs.1,70,58,412/- against the petitioners being the electricity charges of last 6 months and penalty for the alleged theft. The said demand was computed on the basis of method prescribed under notification issued on 2.4.93 in exercise of power conferred under section 49 of the Electricity Supply Act, 1948. On 19.9.03 the Writ Petition preferred in respect of Unit No.1 being Writ Petition No.4259 of 2003 came to be dismissed. The petitioners were permitted to make representation for giving the connection of power supply which was disconnected on 22.9.03. The respondents made a demand for the sum of Rs.1,70,58,412/- in respect of Unit No.2. It is the case of the petitioners that the said claim was ultimately settled at sum of Rs.1,07,91,272/- and that the petitioners has paid

out of the aforesaid amount a sum of Rs.77.0 lacs and the balance amount of Rs.30 lacs is to be paid in two monthly instalments of Rs.15 lacs each which was due in April and May 2004. On the aforesaid payments on 30.10.2003 the power supply has been reconnected and the petitioners have deposited 30% of the claim covered by the demand notice and the re-connection charges. On 30.10.03 the petitioners deposited a sum of Rs.51,17,525/-. Power supply having been restored the petitioners preferred an appeal before the appellate authority challenging the said demand notice on 2.3.04. The said appeal has been dismissed by respondent no.1 by the impugned order. It is this order of the appellate authority is the subject matter of challenge before me in the present petition.

4. It is not disputed that the power supply has been already reconnected in so far as petitioners are concerned on deposit of 30% of demand notice. It is the balance amount which is the subject matter of dispute in this case. The learned counsel appearing for the petitioners has contended before me that both the demand raised by

the respondents by order dt.22.9.03 as well as the order passed by the Appellate Authority on 2.3.04 are illegal and without Jurisdiction and the same are liable to be set aside. It has been contended by the learned counsel for the petitioners that the aforesaid computation covered under the demand notice has been made by the respondents under the Notification dt.2.4.93 which was issued in exercise of power conferred under section 79 of the Electricity (Supply) Act, 1948 read with Section 49 of the said Act.

5. The learned counsel for the petitioners has contended that the impugned orders dt.22.9.03 and 2.3.04 are both illegal and unlawful as the notification dt.2.4.93 lapsed on the provisions of the Electricity Act, 2003, having brought into force on 10.6.03. The learned counsel for the petitioners has drawn my attention to the provisions of section 126 and 127 of the Electricity Act, 2003 and has contended that the procedure for assessment of the Electricity demand in the case of theft has to be computed in accordance with the provisions of section 126 and

127 of the Electricity Act, 2003 and not on the basis of notification dt.2.4.93 which has been issued under the provisions of Electricity (Supply) Act, 1948. It has been contended that the provisions of section 126 and 127 of the Electricity Act, 2003 are totally different than the provisions of the notification dt.2.4.93. It has been contended by the learned counsel for the petitioners that the impugned orders dt.22.9.03 and 2.3.04 which are passed under Notification dt.2.4.93 but subsequent to 10.6.03 when the provisions of s.126 and 127 of Electricity Act, 2003 having brought into effect the said orders are without Jurisdiction and thus the same are liable to be set aside. It has been contended by the learned counsel for the petitioners that the respondents are not in law entitled to rely upon the notification dt.2.4.93 and / or follow the procedure prescribed under the said notification when in effect by virtue of bringing into force the provision of Electricity Act, 2003 a separate method of assessment is provided for u.s.126 and the appeal therefrom under s.127 of the Electricity Act, 2003. It has been thus contended by the

learned counsel for the petitioners that both the orders are illegal, without Jurisdiction and are liable to be quashed and set aside.

6. On the other hand the learned counsel for the respondents has contended that though the provisions of s.126 and 127 has been brought into force on 10.6.03 still by virtue of the proviso contained in section 61 of the Electricity Act, 2003, the notification issued under the Electricity (Supply) Act, 1948 dt.2.4.93 is saved for the period of one year or till the regulations for tariff is framed under section 61 of the said Act, whichever is earlier. It has been contended by the learned counsel for the respondents that section 61 of the said Act provides for fixation of tariff and terms and conditions for determination of such tariff. The said exercise has to be undertaken under section 61 by the Appropriate Commission. It has been contended that there was no such Commission constituted even till the date when the impugned orders are passed. Thus, by virtue of proviso to the said section 61, the earlier tariff and terms and conditions for supply of electricity

on the basis of earlier tariff continue to operate between the parties. It has been contended that the terms and conditions and fixation of tariff in the present case was undertaken and notified by the notification dt.2.4.93 and thus, the said notification continues to operate and provision of s.126 and 127 of the Electricity Act, 2003 does not apply. It has been contended by the learned counsel for the respondents that the provision of s.126 and 127 could only be made applicable when the tariff is so specified by the Appropriate Commission under section 61 of the Act and thus, the provision of s.126 and 127 has no relevance for the purpose of the preset petition. It has been contended that the action of the respondents has to be judged on the basis of notification dt.2.4.93 and not on the basis of provision of s.126 and 127 of the Electricity Act, 2003.

7. It has been thus, contended that the impugned orders dt.22.9.03 and the order passed by the Appellate Authority both are legal and valid. It has been further contended that in fact no such issue was raised by the petitioners before the

authorities below and not only that but by virtue of filing an appeal in pursuance of the notification issued under section 49 of the Electricity (Supply) Act, 1948 and not under section 127 of the Electricity Act, 2003, the petitioners has acquiesced to the Jurisdiction of the authorities under the notification and thus, they are not entitled to raise the issue of Jurisdiction in the present Writ Petition.

8. On merits, the learned counsel for the respondents have contended that the petitioners are the habitual offenders in as much as there was earlier case also as against the petitioners for theft of electricity. It has been thus contended that this court ought not to exercise Jurisdiction in favour of such petitioners under Article 226 and 227 of the Constitution of India.

9. Before I consider the main argument on merits pertaining to the interpretation of the provision of the Electricity Act, 2003 and Electricity (Supply) Act, 1948, it is necessary that the relevant provisions of the Act which are

the subject matter of the interpretation are set out as under:

> **61. Tariff regulations.**- The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-
>
> (a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;
>
> (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;
>
> (c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;
>
> (d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;
>
> (e) the principles rewarding efficiency in performance
>
> (f) multiyear tariff principles;
>
> (g) that the tariff progressively reflects the cost of supply of electricity, and also reduces and eliminates cross-subsidies within the period to be specified by the Appropriate Commission;
>
> (h) the promotion of co-generation and generation of electricity from renewable sources of energy;
>
> (i) the National Electricity Policy and

tariff policy:

Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948 (54 of 1948), the Electricity Regulatory Commissions Act, 1998 (14 of 1998) and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier.

126. Assessment - (1) If on an inspection of any place or premises or after inspection of the equipments, gadgets, machines, devices found connected or used, or after inspection of records maintained by any person, the assessing officer comes to the conclusion that such person is indulging in unauthorised use of electricity, he shall provisionally assess to the best of his judgment the electricity charges payable by such person or by any other person benefited by such use.

(2) The order of provisional assessment shall be served upon the person in occupation or possession or in charge of the place or premises in such manner as may be prescribed.

(3) The person, on whom a notice has been served under subsection (2), shall be entitled to file objections, if any against the provisional assessment before the assessing officer, who may, after affording a reasonable opportunity of hearing to such person, pass a final order of assessment of the electricity charges payable by such person.

(4) Any person served with the order of provisional assessment may, accept such assessment and deposit the assessed amount

with the licensee within seven days of service of such provisional assessment order upon him. Provided that in case the person deposits the assessed amount, he shall not be subjected to any further liability or any action by any authority whatsoever.

(5) If the assessing officer reaches to the conclusion that unauthorised use of electricity has taken place, it shall be presumed that such unauthorised use of electricity was continuing for a period of three months immediately preceding the date of inspection in case of domestic and agricultural services and for a period of six months immediately preceding the date of inspection for all other categories of services, unless the onus is rebutted by the person, occupier or possessor of such premises or place.

(6) The assessment under this section shall be made at a rate equal to one and half times the tariff applicable for the relevant category of services specified in subsection (5).

Explanation - For the purposes of this section -

(a) "assessing officer" means an officer of a State Government or Board or licensee, as the case may be, designated as such by the State Government;

(b) "unauthorised use of electricity" means the usage of electricity-

(i) by any artificial means; or

(ii) by a means not authorised by the concerned person or authority or licensee; or

(iii) through a tampered meter; or

(iv) for the purpose other than for which the usage of electricity was authorised.

127. Appeal to appellate authority - (1) Any person aggrieved by a final order mad under section 126 may, within thirty days of the said order, prefer an appeal in such form, verified in such manner and be accompanied by such fee as may be specified by the State Commission, to an appellate authority as may be prescribed.

(2) No appeal against an order of assessment under subsection (1) shall be entertained unless an amount equal to one-third of the assessed amount is deposited in cash or by way of bank draft with the licensee and documentary evidence of such deposit has been enclosed alongwith the appeal.

(3) The appellate authority referred to in subsection (1) shall dispose of the appeal after hearing the parties and pass appropriate order and send copy of the order to the assessing officer and the appellant.

(4) The order of the appellate authority referred to in subsection (1) passed under subsection (3) shall be final.

(5) No appeal shall lie to the appellate authority referred to in subsection (1) against the final order made with the consent of the parties.

(6) When a person defaults in making payment of assessed amount, he, in addition to the assessed amount, shall be liable to pay, on the expiry of thirty days from the date of order of assessment, an amount of interest at the rate of sixteen per cent per annum compounded every six months.

10. The provisions of the Electricity Act, 2003 has been enacted and has been brought into effect in so far as sections 1 to 121 and 122 to 185 with effect from 10.6.03. Under the scheme of Electricity Act, 2003, the tariff is required to be fixed not by the authorities but by separate commission under section 61 of the Act. It is an admitted position before me that no such tariff was fixed under section 61 of the said Act and question before me is even in absence of fixation of tariff whether the provision of section 126 and 127 which are the machinery provisions in so far as assessment is concerned particularly in the case of theft shall be made applicable. Provision of section 61 takes into account the question which will arise during the transition period that what would be the tariff which will be governed and what are the terms and conditions of such supply of Electricity. The legislature by providing the proviso to the said section 61 has by legal fiction continued the tariff as well as terms and conditions of supply of tariff till and until the period of one year or till new tariffs are fixed under the provision of section 61 of the Act.

11. It is not disputed before me that under the earlier act namely the Electricity (Supply) Act, 1948 the tariff and terms and condition of tariff are fixed by notification dt.2.4.93. Thus, the parties are governed by the tariff fixed by notification dt.2.4.93. However, what is agitated before me by the learned counsel for the petitioners is that for the purpose of tariff, notification may be applicable but for assessment in cases of theft, the provision of s.126 and 127 shall apply and not the balance of provisions of the said notifications. It has been contended that while assessing the demand under section 126 and 127 of the Act, the authority ought to take into consideration the tariff specified under Notification dt.2.4.93 but the authority must ignore the method and the manner prescribed under the notification dt.2.4.93 for the purpose of assessing the demand of the petitioners. In my opinion, the contention raised before me by the learned counsel for the petitioners cannot be accepted. It is because by virtue of proviso contained to s.61 of the Electricity Act what is

saved is not merely the amount of tariff fixed under the notification dt.2.4.93 but even the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948. The provision of s.49 of the Electricity (Supply) Act, 1948 under which the said notification has been issued interalia provides not only for fixation of tariff but even the terms and conditions upon which such electricity will be supplied on the tariff fixed on the basis of uniform tariff fixed under section 49 of the said Act. In my opinion once the notification is issued under section 49 of the said Act it takes into account not only fixation of tariff but also terms and conditions on which the said tariff is fixed. Once it is so, then the computation of demand, the method of computation and the amount of tariff have to be taken into consideration on the basis of notification dt.2.4.93 and it cannot be that the notification under the earlier act i.e. section 49 of the Electricity (Supply) Act, 1948 must apply only in respect of part of the said notification and would not apply as far as other terms and conditions are concerned including the assessment provisions. In

my opinion, the contention of the learned counsel for the petitioners that while carrying out assessment u.s.126 and 127 of the Electricity Act, 2003, the tariff has to be taken into consideration as per the notification dt.2.4.93 and nothing else, cannot be accepted. It is because both under the provision of section 49 of the Electricity (Supply) Act, 1948 and provision of section 61 of the Electricity Act, 2003 what is required to be fixed is not only the tariff but even the terms and conditions on which the said Electricity Supply has to be effected on the basis of tariff fixed. The learned counsel has stressed on the words appearing in the provision of s.61 which are 'the terms and conditions for the determination of tariff.

12. It has been contended that when you use the words 'terms and conditions' it is not terms and conditions for supply of electricity but terms and conditions for determination of tariff. In my opinion, the aforesaid argument lacks merits. It is because when you interpret the word 'terms and conditions for determination of tariff' it would be open for the Commission also to determine the terms and condition on which the said electricity should

be supplied on that particular tariff. The contention of the learned counsel for the petitioners that both the provision of section 49 of the Electricity (Supply) Act, 1948 and section 126 and 127 of the Electricity Act, 2003 for the purpose of assessment under the new Act must be made applicable so as to take the tariff amount from the old Act and assess under the new Act, cannot be accepted. It is in my opinion the fixation of tariff is charging a provision whereas recovery thereof of way of assessment is machinery provision. Once under the proviso to Section 61 the charging provisions are saved obviously then the entire provisions pertaining to charging of tariff as well as recovery thereof by employing the machinery provisions, would be applicable.

13. I am unable to accept the contention of the learned counsel for the petitioners that even under the clause III of the notification which provides for assessment, only tariff should be picked up from the notification and rest of the provisions of the said notification should be ignored. I am of the view that by virtue of s.61 of the Electricity

Act, 2003 the notification dt.2.4.93 is saved and therefore the authorities below had appropriate Jurisdiction to pass necessary orders by relying upon the said notification and appellate authority also had Jurisdiction to entertain the appeal and decide the same.

14. I also find substance in the contention of the learned counsel for the respondents that the petitioners has acquiesced with the jurisdiction of the lower authorities. It is not in dispute that the demand which was raised, was raised on the basis of notification dt.2.4.93 and the petitioners have not disputed the said demand before the authority on the ground that the same is not assessed in terms of section 126 and 127 of the Electricity Act, 2003. Not only that but by relying on the said notification even the appeal has been preferred before the authority as prescribed in the said notification by the petitioners. The contention of the learned counsel for the petitioners that the Jurisdiction goes to the root of the matter and thus the principles of acquiescence should not be applied, cannot be

accepted. Having contested the matter before the authorities under the notification dt.2.4.93 and having raised no issue of Jurisdiction before the authority, it is not permissible for the first time in writ Jurisdiction under Article 226 and 227 of the Constitution of India to raise the issue for the first time. Therefore I find no merits in the present case. In the aforesaid view of the fact, the present petition must fail. Petition is accordingly dismissed. There shall be no order as to costs.

15. The learned counsel for the petitioners seek time to approach the Supreme Court for filing an appeal. In that view of the matter, Respondent Administrator is directed not to disconnect the electricity supply for a period of 6 weeks from today.